

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 12

LOUIS H. EBERLEIN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED JULY 18, 1918.

(26,652)

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

(26.552)

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OCTOBER TERM, 1918.

No. 566.

LOUIS H. EBERLEIN, APPELLANT,

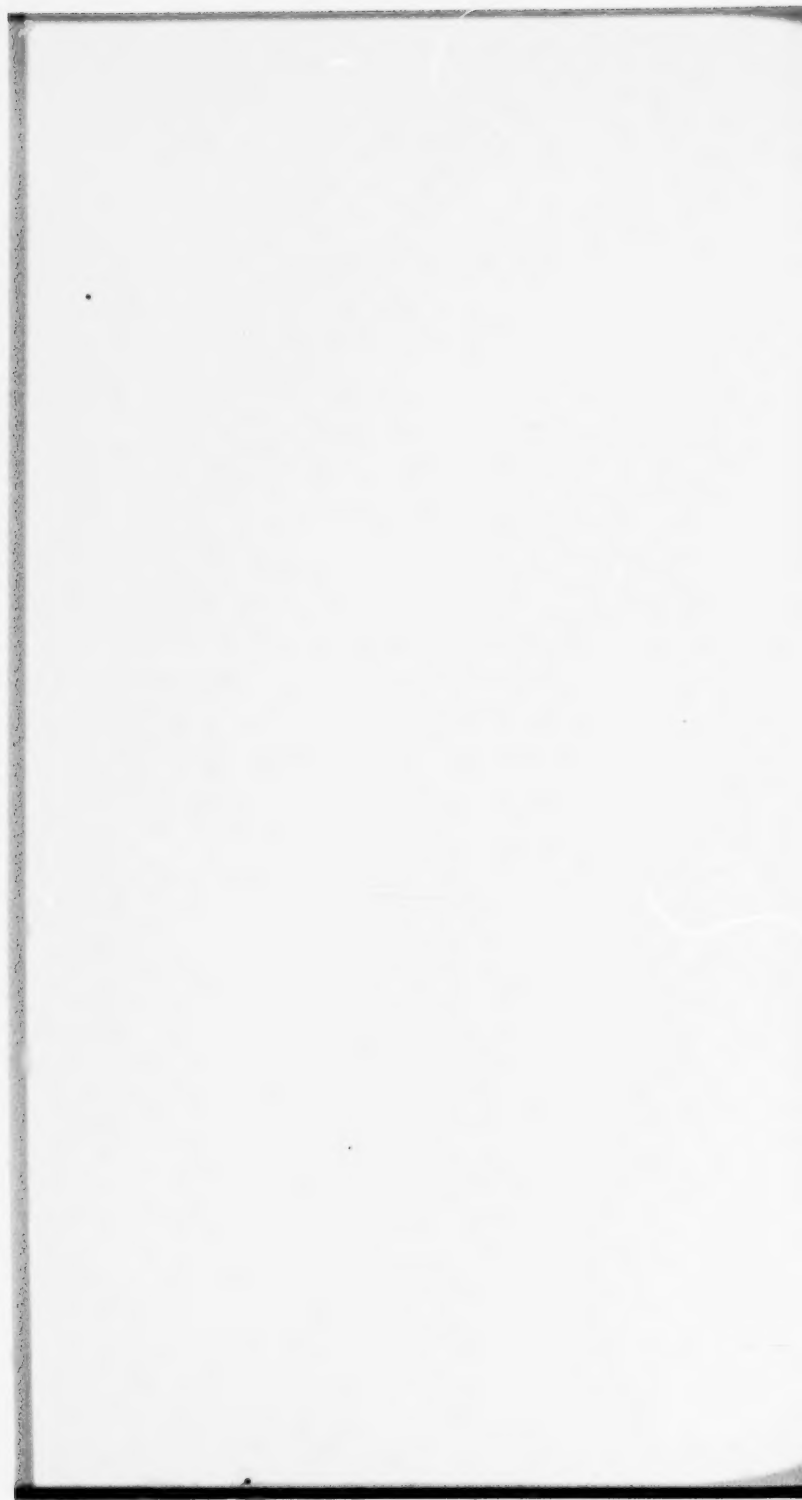
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THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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I. *Petition. Filed May 25, 1916.*

In the Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

VS.

THE UNITED STATES.

Petition.

To the Chief Justice and Judges of the Court of Claims:

The claimant respectfully represents and shows:

I. Claimant is a citizen of the United States, and a resident of the State of New York.

II. Claimant was employed in the service of the United States as an Assistant Weigher of Customs in and for the Port of New York prior to the month of March, 1909. During said month of March, 1909 claimant was promoted to the office of United States Storekeeper in and for the said Port of New York at a compensation of Fourteen Hundred (\$1400) dollars per annum. On or about the 10th day of January, 1910, claimant was further promoted as such United States Storekeeper to a compensation of Sixteen Hundred (\$1600) dollars per annum. Before entering upon the performance of his duties under and by virtue of the aforesaid appointments, claimant took the usual oath of office required therefor. These aforesaid appointments were made by the Secretary of the Treasury upon the nomination of the Collector of the Port of New York.

III. On or about the 9th day of May, 1910, claimant was suspended from duty and pay to take effect at the close of business on said day, by the Collector of Customs for the Port of New York. This said suspension was made pending an investigation of certain charges made against claimant to the effect that he had participated in underweighing frauds against the United States. Claimant was directed to put in an answer to said charges within three days from the receipt thereof. Under date of May 11th, 1910 claimant submitted an answer denying said charges. This answer of claimant's was sworn to before a notary public in and for the County of New York. On May 26th, 1910 claimant was removed from his position as United States Storekeeper on the ground that he had participated in the underweighing of dutiable merchandise at the said Port of New York, as alleged in the charges given to claimant on the 9th day of May, 1910.

IV. Claimant repeatedly protested to various officials in the Cus-

toms Service against his removal from the Service, and made repeated efforts to obtain a hearing upon the said charges before the decision thereupon. Thereafter claimant made frequent requests for a reconsideration of the charges that led to his removal, and at various intervals requested his reinstatement.

V. Despite repeated efforts made by claimant, for reconsideration of said charges, no action was taken thereupon by the Treasury Department, except to re-affirm the previous determination.

VI. Claimant finally appealed to the Attorney General of the United States for a reconsideration of the evidence that was furnished by the said Attorney General to the Collector of the Port of New York, and which led to claimant's removal, as aforesaid, and as a result of said appeal, the said Attorney General caused an investigation to be made during the month of May, 1912. As result of this investigation, it developed that claimant had been unjustly charged with participation in under-weighting frauds, and that he had been unjustly removed from the service of the United States. Under date of June 11th, 1912, the said Attorney General of the United States addressed a letter to the Secretary of the Treasury recommending

claimant's restoration to the office from which he had been dismissed. No action was taken thereupon until the case was called to the attention of the President of the United States in October, 1912, who caused a further investigation to be made, and upon the completion thereof, issued an executive order as follows:

"Mr. Louis H. Eberlein may be reinstated to any appropriate classified position in the Customs Service at New York without regard to the length of time he has been separated from the service. Mr. Eberlein was separated from the service on May 26, 1910, on a charge of accepting money from importers and under-weighting dutiable merchandise. Upon a rehearing of the case by the Surveyor of Customs at New York the opinion was reached that neither the charges as a whole nor any specification had been sustained, and in view of Mr. Eberlein's previous good record a commendation was made that the charges be dismissed.

The Attorney General, after review of the case, stated that he deemed it a case where an honest man suffered from the general atmosphere of his surroundings, and that the recommendations of the Surveyor of Customs should be acted upon and Mr. Eberlein reinstated.

The Department reached the conclusion that Mr. Eberlein's dismissal from the service was not justified and that his reinstatement would be in the interests of good administration.

The Civil Service Commission joins in recommending this order.
(Sgd.) WM. H. TAFT

The Whitehouse, December 3, 1912."

VII. Claimant was, by virtue of his appointment, an employee of the Civil Service of the United States, at all times hereinbefore and hereinafter mentioned, under the Act of Congress of January 16th, 1883, known as the Civil Service Law.

VIII. During all the time from the date of claimant's unjust suspension on May 9th, 1910, as heretofore alleged, to the 16th day of December, 1912 when claimant was restored to his position as United States Storekeeper at Sixteen Hundred (\$1600) dollars per annum, claimant stood ready, willing and able to perform the duties of the office to which he had been lawfully appointed and from which he was unlawfully separated. Claimant avers that during all this time he was prevented from performing the duties of his said office by direction of the Secretary of the Treasury or his subordinates.

IX. Claimant avers that he was, and is entitled to the compensation of Sixteen Hundred (\$1600) dollars per annum during all the time from May 9th, 1910 to December 15th, 1912, amounting to Four Thousand One Hundred Sixty-four and 44/100 (\$4,164.44) dollars.

X. No action has been taken on this claim except that set forth in this petition.

XI. Claimant is the sole owner of this claim, no other person or corporation is interested therein, and no assignment or transfer of the claim or any part thereof, or interest therein has been made.

XII. Claimant is justly entitled to the amount herein named from the United States, as he is advised and believes, after allowing all just credits and set-offs.

Wherefore, he prays judgment against the United States in the sum of Four Thousand One Hundred Sixty-four and 44/100 (\$4,164.44) dollars.

SPOOR & RUSSELL,
Attorneys of Record.

DUDLEY & MICHENER,
Of Counsel.

7 STATE OF NEW YORK,
County of New York, ss:

Personally appeared before me, a notary public, in and for the County of New York, William E. Russell, who being sworn according to law, deposes and says: that he is a member of the partnership of Spoor & Russell, which partnership has been duly authorized by power of attorney, to represent the claimant and verify pleadings in this case; that he has read and understands the foregoing petition, and that the matters and things therein stated are true in substance and in fact, as he is informed and believes.

WILLIAM E. RUSSELL.

Subscribed and sworn to before me this 24th day of May, 1916.
[SEAL.]

E. E. LEVINE,
Notary Public, Kings Co.

Cert. filed N. Y. Co. County Clerk's Nos.: Kings Co. 77; N. Y. Co. 230. Register's Nos.: Kings Co. 8081; N. Y. Co. 8200.

Commission expires March 30, 1918.

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II. *General Traverse.*

Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

VS.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. *Argument and Submission of Case.*

On March 6, 1918 this case was argued and submitted on merits by Mr. W. E. Russell, for the claimant, and Mr. Harvey D. Jacobson, for the defendants.

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IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Booth, J., in which Hay, J., Downey, J., Baughney, J., and Campbell, Ch. J., Concur. Entered May 2, 1918.*

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

Claimant is a citizen of the United States and a resident of the State of New York.

II.

Plaintiff was an assistant weigher in the customs service at the port of New York prior to the month of March, 1909. During the said month of March, 1909, he was duly promoted to the office of United States storekeeper, at a compensation of \$1,400 per annum. He was further promoted as such United States storekeeper on January 10, 1910, to the compensation of \$1,600 per annum.

III.

At the close of business on the 9th day of May, 1910, plaintiff was suspended from duty and pay by the collector of customs at the port

of New York, pending an investigation of written charges preferred against claimant, accusing him of participating in underweighing frauds. Plaintiff was allowed three days to answer the charges and submitted a sworn answer under date of May 11, 1910, denying each and every one of said charges. He was removed from the service on May 26, 1910, by the Secretary of the Treasury upon the recommendation of the collector of customs on the ground that he had participated in the underweighing frauds, as charged.

IV.

Plaintiff duly protested against his removal and made several efforts to obtain a hearing upon the charges prior thereto. After his removal plaintiff made frequent requests for a hearing, for a reconsideration of the charges, and for reinstatement. These various requests were denied by the Treasury Department.

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V.

Plaintiff finally appealed to the Attorney General of the United States for a reconsideration of the evidence that was furnished by the said Attorney General to the collector of the port of New York, and which led to claimant's removal, as aforesaid, and as a result of said appeal the said Attorney General caused an investigation to be made during the month of May, 1912. As a result of this investigation, it developed that plaintiff had been unjustly charged with participation in underweighing frauds. Under date of June 11, 1912, the said Attorney General of the United States addressed a letter to the Secretary of the Treasury recommending plaintiff's restoration to the office from which he had been dismissed. No action was taken thereupon until the case was called to the attention of the President of the United States in October, 1912, who caused a further investigation to be made, and upon the completion thereof issued an Executive order, as follows:

"Mr. Louis H. Eberlein may be reinstated to any appropriate classified position in the customs service at New York without regard to the length of time he has been separated from the service. Mr. Eberlein was separated from the service on May 26, 1910, on a charge of accepting money from importers and underweighing dutiable merchandise. Upon a rehearing of the case by the surveyor of customs at New York the opinion was reached that neither the charges as a whole nor any specification had been sustained, and in view of Mr. Eberlein's previous good record recommendation was made that the charges be dismissed.

"The Attorney General, after review of the case, stated that he deemed it a case where an honest man suffered from the general atmosphere of his surroundings, and that the recommendations of the surveyor of customs should be acted upon and Mr. Eberlein reinstated.

"The department reached the conclusion that Mr. Eberlein's dis-

missal from the service was not justified and that his reinstatement would be in the interest of good administration.

"The Civil Service Commission joins in recommending this order.
"(Sgd.) WM. H. TAFT.

"The White House, December 3, 1912."

VI.

Claimant was an employee in the customs service under the classified civil service.

VII.

If plaintiff is entitled to the salary of his office as United States storekeeper at the rate of \$1,600 per annum from May 9, 1910, to December 15, 1912, the same would amount to \$4,164.44.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the petition herein should be and the same is
11 hereby dismissed, and judgment is rendered in favor of the United States against the plaintiff for the cost of printing the record in this cause in the sum of thirty-six dollars and sixty-five cents (\$36.65) to be collected by the clerk as provided by law.

Opinion.

Boorn, *Judge*, delivered the opinion of the court.

The plaintiff, Louis H. Eberlein, held the office of United States storekeeper in the customs service in and for the port of New York; he had been advanced to this position through two promotions. On May 9, 1910, the plaintiff was suspended from duty without pay, to take effect at the close of the above business day. The cause for his suspension was the preferment of certain charges wherein he was alleged to have been involved in the underweighing frauds perpetrated by certain customs officials against the United States. The charges made were extremely serious, both from a moral and legal view, and if proven convicted him of having accepted money bribes from certain importers to underweigh cargoes of sugar and thereby defraud the Government. The plaintiff answered the charges in writing and under oath specifically denied guilt, asserting with much positiveness that as to him the charges were a mistake. On May 26, 1910, plaintiff was removed from office because of said charges. In May, 1912, two years subsequent to his removal, plaintiff induced the Attorney General of the United States to reinvestigate his record. The Attorney General after a careful and detailed investigation did, on June 11, 1912, report in writing to the Secretary of the Treasury in effect that the charges were not sustained and the plain-

plaintiff should be reinstated. Mr. Nelson M. Henry, surveyor of the port, on June 5, 1912, made to the collector of customs a similar report after an investigation. On December 3, 1912, President Taft, by an Executive order of that date, and in pursuance of a still further investigation of the matter, directed the reinstatement of the plaintiff, and on December 16, 1912, the collector did reinstate him in his former position. This suit is to recover the salary of the office held by the plaintiff from the date of his removal therefrom to the date of his reinstatement.

Article 1385 of the Customs Laws and Regulations of 1908 provides as follows:

"Subordinate customs officers are removable by the Secretary of the Treasury. The name of any subordinate officer whose removal is deemed necessary or proper is to be reported to the Secretary of the Treasury, with a full statement of the reasons therefor, and no removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the department or with another appointing officer, of which the accused shall have full notice and an opportunity to make defense."

There are certain features of the case which are admitted. The plaintiff was an appointee in the classified service and the office he held was likewise subject to said service. The innocence of the plaintiff must also be conceded, not that it is by the defendants; nevertheless the record precludes a contrary assertion. It is also apparent that the proceedings followed to remove and subsequently reinstate the plaintiff were regular and followed the law. The officers of the defendants participating therein were duly authorized and empowered to do the things they did do. With these features of the case removed from consideration the issue is narrowed and we are alone to determine whether the reinstatement of the plaintiff operated to continue him in office during the period of his removal.

The intent and spirit of the civil service law and the regulations promulgated thereunder need at this time no elaboration. The plaintiff was removed in accord with their provisions, and the question as to just cause was left with the executive authorities, the courts dealing alone with any departure from the law itself. The discretionary power of the executive officer authorized to act is final and not subject to review by the courts. *Keim v. United States*, 177 U. S., 290.

In so far as cited authorities extend the instant case seems sui generis. If the civil service law has been complied with the courts are prevented from going further. The plaintiff received the full measure of his rights under the law; he was accorded all the privileges it extends, and his removal from office was in strict accord therewith. The charges resulting in his removal from office were referred in writing, his answer thereto in writing was duly filed, and the record thus made was before the proper officer for his final action. The officer removed him and from his decision there was no direct appeal provided by law. The proceedings subsequent to his

lawful separation from office simply reinstated him in the classified service, made him reeligible to appointment and subsequently resulted in his reinstatement in the Government service. The word "reinstatement" was used, but not in a strict technical sense as intending to nullify all that had been done before and return the plaintiff to his exact former state in the service. The final action by the President reinstated the plaintiff in the classified service, not the Government service; it would hardly be contended that if no position had then been open for the appointment of the plaintiff he would in virtue of the President's proclamation have been entitled to the position from which he had been removed. The charges upon final review were found to have been without merit. The record convinced the officers having charge thereof that a wrong had been done the plaintiff, and the righting of the wrong found expression in the public proclamation of the President. The plaintiff's removal was in effect set aside and he himself restored to eligibility in the Government service despite the lapse of time and whatever intervening obstacles obstructed his path by reason of the charges made against him. It did not and was not intended to convert his removal into a mere suspension from duty. The legal effect was not to nullify his lawful removal, but to set aside and render him eligible to again be appointed to the office from which he had been removed. An Executive act was indispensable, without which the plaintiff was ineligible for appointment to any position in the classified service.

The petition is dismissed. It is so ordered.

Hay, Judge; Downey, Judge; Barney, Judge, and Campbell, Chief Justice, concur.

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V. Judgment of the Court.

At a Court of Claims held in the City of Washington on the Twenty-seventh day of May, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that Louis H. Eberlein, as aforesaid is not entitled to recover and shall not recover any sum in this action of and from the defendants, the United States; and that the petition be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimant, Louis H. Eberlein, as aforesaid, the sum of Thirty-six dollars and sixty-five cents (\$36.65), the cost of printing the record in this cause in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. Proceedings Had After Entry of Judgment.

On June 5, 1918 the claimant filed a motion to amend the court's findings of fact. On June 17, 1918 this motion was overruled by the court.

VII. *Claimant's Application for and Allowance of an Appeal.*

Comes now the claimant and makes application for an appeal to the Supreme Court of the United States.

SPOOR & RUSSELL,
Attys. of Record.

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

July 16, 1918.

14 Court of Claims.

No. 33266.

LOUIS H. EBERLEIN

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusions of law, and opinion of the court by Booth, J.; of the judgment of the court; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 16th day of July, A. D. 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,652. Court of Claims. Term No. 566. Louis H. Eberlein, appellant, vs. The United States. Filed July 18th, 1918. File No. 26,652.